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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 471

JOHN JACOB SAMARIN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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December 1, 1964

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Petitioner prays that this Court grant rehearing of its order of November 9, 1964 denying the petition for writ of certiorari, 379 U.S. ——, and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case, as prayed for in the petition filed with this Court on September 8, 1964.

Reasons for Granting Rehearing and Issuing the Writ

1. On October 13, 1964, this Court granted a writ of certiorari in the case of *Douglas* v. *Alabama*, No. 313, October Term, 1964, 379 U.S. ——, unofficially reported in 33 U.S. Law Week 3144.[1] For reasons stated herein below, petitioner believes that the issue raised by the

[1] The decision below is reported at 163 So. 2d 477 (Ala. App., 1963).

Court's grant of the writ in *Douglas* v. *Alabama, supra,* may bear directly upon and support the second ground assigned by the petitioner in his petition of September 8, 1964 as a justification for the issuance of certiorari in this case.

2. The petitioner filed his petition for certiorari in this Court on September 8, 1964. After securing an extension of time in which to answer on October 15, 1964, the Government filed its opposition on October 27, 1964. This Court had granted certiorari in *Douglas* v. *Alabama* on October 13, 1964. Petitioner concedes that he could have brought *Douglas* v. *Alabama, supra,* to the attention of the Court in a reply brief timely filed before the announcement of a denial of certiorari in this case on November 9, 1964. However, petitioner was in difficult personal and financial circumstances at the time. As a consequence, he was not financially able to authorize his attorneys to file a reply brief. Petitioner was aware that his Washington counsel had advised Ohio counsel by letter of his opinion that this Court's grant of certiorari in *Douglas* v. *Alabama* encompassed an issue analogous to, and supported, petitioner's claim that he was substantially prejudiced by the trial court's sanctioning of an impairment of his co-defendant's privilege against self-incrimination at the trial leading to their conviction. However apart from his then pressing financial situation, petitioner believed that this Court's grant of the writ in *Douglas* v. *Alabama,* presaged its issuance in this case. A reply, he felt, even if he could have authorized that it be prepared and filed, was therefore unnecessary.

3. Nevertheless, a petition for rehearing of a denial of a petition for writ of certiorari "is not to be deemed an empty formality . . ." A denial of a petition for certiorari "should not be treated as a definitive determination

in this Court, . . ." *Flynn* v. *United States*, 348 U.S. 909, 99 Law Ed. 1298, 1299. The Court has granted petitions for rehearing based on the claim that the same or related issues were before the Court in other cases still pending. *Pickett* v. *Union Terminal Co.*, 313 U.S. 591, 314 U.S. 704, 315 U.S. 386, 394; Stern & Gressman, Supreme Court Practice, (3rd Ed.) p. 389; Robertson & Kirkham, Jurisdiction of the Supreme Court of the U.S. (Wolfson & Kurland Ed.) p. 613. Counsel for petitioner believe, therefore, that they are justified under Rule 58 of the rules of this Court in filing this petition for rehearing, despite the fact that the matter it now raises could have been presented to the Court in a timely reply brief, had petitioner's personal situation permitted it.

4. In *Douglas* v. *Alabama*, 379 U.S. ——, this Court granted certiorari limited to the following question:

> "Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant."[2]

5. The basic facts in *Douglas* v. *Alabama* are these: An accomplice who had been convicted the day before petitioner was brought to trial had been called by the state as a witness against him. After the witness had answered a few preliminary questions, some straightforwardly, others evasively, the prosecution attempted to question the accomplice about an alleged written confession on his part. The accomplice refused to answer, insisting

[2] 33 U.S. Law Week 3128, October 13, 1964.

on his privilege against self-incrimination. The prosecution then went on to put a series of questions to the witness, all relating to paragraphs of the alleged confession for the purported purpose of refreshing his recollection. Although not clear, the record suggests, and the Court of Appeals of Alabama took it, that counsel for Douglas, the petitioner, had waived any claim of prejudice at the trial by failure to make timely objection when the state solicitor attempted to refresh the recollection of the accomplice by posing questions relating to various paragraphs of the latter's alleged confession.

6. In the instant case, petitioner argues, and has asserted as a ground in support of his petition for certiorari, that the trial court, in permitting a substantial impairment of his co-defendant's privilege against self-incrimination, also sanctioned thereby the prejudicial use against the petitioner as well as the co-defendant of improper and highly damaging testimony. *Cf. McDonald* v. *United States*, 335 U.S. 451, 456; *Anderson* v. *U.S.*, 318 U.S. 350, 356-7. In both cases, the alleged accomplice had made timely claim of the privilege; in both cases, the claim was effectively circumvented at trial. On the facts, however, this petitioner would seem to assert an even stronger claim than that which sufficed to cause this Court to grant certiorari in *Douglas* v. *Alabama*, *supra*, where the record suggests that there the petitioner may have waived his right by his counsel's failure to make timely objection at trial. Moreover, unlike the Alabama case, the case at bar does not give rise to the sometimes delicate and difficult decision as to whether this Court should interdict state criminal procedure in order to guarantee the fundamental fairness of the proceedings leading to petitioner's conviction.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari be issued to the Court of Appeals for the Fifth Circuit. Alternatively, petitioner asks that the Court vacate its order of November 9, 1964, denying certiorari herein, pending the Court's ultimate decision in *Douglas v. Alabama, supra.*

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

/s/ ALFRED L. SCANLAN.

Filed: December 1, 1964.